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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

FIDES, A. G.,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Fides, A. G., a Swiss corpration, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment or decree of that court entered August 16, 1943, affirming a decision of the United States Board of Tax Appeals sustaining a deficiency income surtax and penalty aggregating $11,255.33 assessed by respondent against the petitioner for the year 1936.

Summary Statement of Matter Involved.

The matter involved in this case is the judicial construction of Title IA, Section 351, and Section 291 (Pen-

alty) of the Internal Revenue Act of 1936. It is the first case decided upon similar facts by the Board of Tax Appeals, the first reviewed by any United States Circuit Court of Appeals and the first to reach this Court.

Section 351 provides for the levy and payment of a graduated surtax upon the undistributed adjusted net income of every personal holding company. The material subdivisions of Section 351 follow:

> "(a) IMPOSITION OF TAX.—There shall be levied, collected, and paid, for each taxable year (in addition to the taxes imposed by Title I), upon the undistributed adjusted net income of every personal holding company a surtax * * *
>
> "(b) DEFINITIONS.—As used in this title
>
> "(1) The term 'personal holding company' means any corporation * * * if (A) at least eighty per centum of its gross income is * * * derived from royalties, dividends, interest * * *, and (B) at any time during the last half of the taxable year more than fifty per centum in value of its outstanding stock is owned directly or indirectly, by or for not more than five individuals.
>
> "(2) The term 'undistributed net income' means the net income minus the sum of (A) * * * (B) * * * (C) the amount of the dividends paid credit provided in Section 27. * * *.
>
> "(4) The terms used in this section shall have the same meaning as when used in Title I.
>
> "(c) ADMINISTRATIVE PROVISIONS.—All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I* of this Act shall, in so far

* All of the sections of the Act preceding Section 351 are included in Title I. Section 351 is the only section contained in Title IA.

as not inconsistent with this section, be applicable in respect of the tax imposed by this section."

The facts were stipulated before the Board of Tax Appeals (R. 20). Those material to this application are that petitioner is a corporation organized in Switzerland in 1911. At all the times here relevant it was not engaged in trade or business in the United States and had no office or place of business therein (R. 20). In 1936 all of its outstanding stock was owned directly or indirectly by not more than five individuals all of whom were, during 1936, and at all times prior thereto, nonresident aliens not engaged in trade or business within the United States and not having an office or place of business therein (R. 21). About sixteen years ago petitioner acquired certain American securities and since then it has held and owned American securities and received the income therefrom consisting of interest and dividends (R. 20). It filed its Federal Income Tax Returns (Sec. 144, withholding tax) on the basis of cash receipts and disbursements. Its activities in the United States during 1936 and for many years prior thereto consisted only in effecting transactions in securities through a resident broker or custodian and in receiving the income from the securities held (R. 20).* Petitioner's gross income from sources within the United States for the three-year period ending December 31, 1935, was 28.54 per cent of its total gross income for that period from all sources (R. 21). By the provisions of Section 119 (a)(2)(B) of the Revenue Act of 1936 dividends paid by petitioner in 1936 were not considered or treated as income from sources within the

* Section 211 of the Revenue Act of 1936 provides that the phrase "engaged in business within the United States" does not include the effecting of transactions in the United States in stocks, securities or commodities through a resident broker, commission agent or custodian.

United States and were not required to be included in the gross income of the stockholders receiving them even if the latter resided in the United States. Section 119 reads in part as follows:

> "(a) Gross Income from Sources in United States.—The following items of gross income shall be treated as income from sources within the United States: * * * (2) Dividends.—The amount received as dividends—(A) * * * (B) from a foreign corporation unless less than fifty per centum of the gross income of such foreign corporation for the three-year period ending with the close of its taxable year preceding the declaration of such dividends * * * was derived from sources within the United States as determined under the provisions of this section; * * *".

For the calendar year 1936 petitioner paid Federal Income Tax withheld at the source of $2,586.04 and paid in Switzerland a dividend of 100,000 Swiss Francs, then the equivalent of $28,041.25 in American dollars (R. 21) for which payment it received no "dividend paid" credit (R. 30)* On January 3, 1940, it filed under protest a Personal Holding Company Tax Return for 1936 with the Collector of Internal Revenue at Baltimore, Maryland (R. 1).

Under the stipulated facts, the applicable law and the administrative Regulations promulgated for the enforcement of the Act, petitioner's stockholders would, in no event, be taxable on dividends paid by petitioner because, under Section 119 (a)(2)(B) earnings distributed by petitioner

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* Section 27(h) of the Revenue Act of 1936 provides as follows: (h) Nontaxable Distributions.—If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part.

in 1936 would not be considered income from sources within the United States and would, therefore, not be taxable to the stockholders. In addition thereto, under Article 102-1 of the administrative Regulations,* it is provided that, even though a foreign corporation derived income from sources within the United States, its stockholders would not be liable to tax if they were all nonresident alien individuals not engaged in trade or business in the United States and not having an office or place of business therein.

In order to apply correct legal principles to the foregoing facts it is necessary to construe the Act according to the intent and purpose of Congress in enacting it. The only purpose of Congress in its enactment was to reach the "incorporated pocketbook" and to compel the corporation to distribute its surplus earnings so that, when distributed, the stockholders would be liable for normal tax and surtax on the dividends they received and the revenue of the government would thus be increased. *Pembroke Securities Corporation* vs. *Commissioner*, 122 Fed. (2d) 252 (2d Circuit); *Morris Investment Corporation* vs. *Commissioner*, 134 Fed. (2d) 774 (3rd Circuit); *Helvering* vs. *Chicago Stock Yards Company*, 318 U. S. 693.

The Board did not construe the Act according to the intent and purpose of its enactment but construed it literally and held that the words "any corporation" included all corporations regardless of the country of their incorpora-

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* Article 102-1 of Regulations 94 provides in part as follows: "On the other hand, even though a foreign corporation, whether resident or nonresident, derives income from sources within the United States, if it is composed entirely of nonresident alien individuals who are not engaged in trade or business within the United States and who do not have an office or place of business therein, the tax imposed by Section 102 will not apply, as such individuals would not be subject to the surtax with respect to distributions of the corporation. (See Section 211 (a).)"

tion, or the country of their residence, regardless of the fact that the corporation transacted no business within the United States and that it had no office or place of business therein. The Board also necessarily construed the words "not more than five individuals" to mean any five individuals, whether citizens or residents of the United States and taxable here or nonresident aliens not having an office or place of business within the United States, not transacting business therein and therefore not taxable by the United States.

The findings of fact and the opinion of the Board of Tax Appeals are reported in 47 B. T. A. 280. They appear in the Record at pages 26-34. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is officially reported in 137 Fed. (2d) 731 and will be found on pages 43-50 of the Record.

The decision of the Board of Tax Appeals was in all respects affirmed by the United States Circuit Court of Appeals for the Fourth Circuit with the following results: (a) Extra-territorial effect is given to the law and the Regulations in that the Commissioner of Internal Revenue is authorized to interfere with and regulate the internal affairs of a corporation, a citizen of and domiciled in the Republic of Switzerland, which transacts no business in the United States and has no office or place of business therein, all of whose stockholders are nonresident alien individuals none of whom transacts any business in the United States or has any office or place of business therein. (b) It levies a surtax against the petitioner which discriminates against it in violation of the terms of the treaty existing between the United States of America and the Republic of Switzerland. Treaty of Commerce and Friendship Proclaimed

November 9, 1855 (United States Statutes at Large vol. 11 p. 587, vol. 18 part 2 p. 748). (c) If petitioner distributed its entire surplus income it would, nevertheless, be liable for the surtax imposed by Section 351 on all of the income it received from sources within the United States. If petitioner did not distribute its income it would still be subject to the surtax imposed by that section, while a domestic corporation or a foreign corporation, having not more than five stockholders who were subject to normal income tax or surtax by the United States, could escape said surtax in its entirety by distributing its surplus earnings to its stockholders.

Holding that the petitioner is liable for the surtax imposed by the statute, whether it does distribute its earnings or does not distribute them, is absurd, unjust, oppressive and discriminative.

In making the decree sought to be reviewed, the Court below disregarded or overlooked the express provisions of Sections 119 (a)(2)(B) and 27(h) of the Revenue Act of 1936, and the provisions of Articles 102-1, 143-1 and 143-9 of the administrative Regulations of the Act of 1936.

Jurisdictional Statement.

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. §347 (a)), §1003(a) of the Revenue Act of 1926 (44 Stat. 110, 26 U. S. C. 1226 (a)), and §1141 of the Internal Revenue Code.

The date of the decree of the United States Circuit Court of Appeals for the Fourth Circuit to be reviewed is August 16, 1943 (R. 31).

Questions Presented.

1. Whether the United States Circuit Court of Appeals for the Fourth Circuit erred in holding that a foreign corporation, which was not engaged in trade or business within the United States and which had no office or place of business therein, all of the stock of which was owned by not more than five nonresident alien individuals, none of whom was engaged in trade or business within the United States and none of whom had an office or place of business within the United States, and which corporation paid the withholding tax on its income from sources within the United States, as provided by Section 144 of the Revenue Act of 1936, was subject to the assessment and payment of the surtax provided for by Section 351 of the Revenue Act of 1936.

2. Whether extraterritorial effect can be given to Section 351 of the Revenue Act of 1936, and an assessment be levied thereunder against a corporation incorporated and domiciled in Switzerland, which corporation transacts no business within the United States, has no office or place of business therein, all of the stockholders of which are nonresident aliens, none of whom transacts business in the United States nor has any office or place of business therein.

3. Whether the United States Circuit Court of Appeals for the Fourth Circuit erred in holding and deciding that the assessment of the surtax provided for by Section 351 of the Revenue Act of 1936 against the petitioner was not in violation of the terms of the treaty existing between the United States and the Republic of Switzerland.

4. Whether the United States Circuit Court of Appeals for the Fourth Circuit erred in disregarding or overlooking

the express provisions of Sections 119 (a)(2)(B) and 27(h) of the Internal Revenue Act of 1936 and Articles 102-1, 143-1 and 143-9 of the administrative Regulations.

5. Whether the provisions of the last sentence of Article 102-1 of the administrative Regulations of the Revenue Act of 1936 apply to *all* foreign corporations composed entirely of nonresident alien individuals who are not engaged in trade or business within the United States and who do not have an office or place of business therein or only to such foreign corporations as are subject to the provisions of Section 102 of the Internal Revenue Act of 1936.

6. Whether the Commissioner of Internal Revenue of the United States has the power and authority to waive enforcement of the provisions of Section 27(h) of the Revenue Act of 1936.

Reasons Relied on for Allowance of the Writ.

(a) A federal question of great importance is involved in this case which has never before been passed upon by any United States Circuit Court of Appeals; which has never before been passed upon, and which should be passed upon by this Court.

Montana Mining Co. vs. *St. Louis Mining Co.*, 204 U. S. 204;
International Railway Co. vs. *Davidson*, 257 U. S. 506.

(b) The Personal Holding Company Surtax Act, Section 351 of the Internal Revenue Act of 1936, and Section

291 of the same Act are involved herein and have never, under similar facts, been passed upon by any court except the court below. The decision in this case is of importance to the administration of the Revenue laws. *United States* vs. *Johnston,* 268 U. S. 220.

(c) The construction given to Section 351 of the Revenue Act of 1936 by the court below is in conflict with other decisions of this Court over a period of one hundred and twenty-five years.

> *United States* vs. *Palmer,* 3 Wheat. 610;
> *American Banana Company* vs. *United Fruit Company,* 213 U. S. 347;
> *United States* vs. *American Trucking Association,* 310 U. S. 534,

and other cases cited in the annexed brief.

(d) The decree sought to be reviewed by the petitioner, in substance and effect, gives to the Internal Revenue Bureau of the United States extraterritorial powers and authorizes that Bureau of the Executive Branch of the Federal Government to regulate the internal affairs of a corporation incorporated and domiciled in the Republic of Switzerland, which corporation transacts no business in the United States and has no office or place of business therein, and is in conflict with prior decisions of this Court.

> *The Apollon,* 9 Wheat. 362;
> *United States* vs. *Bank of New York & Trust Company,* 296 U. S. 463,

and other cases cited in the annexed brief.

(e) The decision of the court below which the petitioner seeks to have reviewed by this Court contravenes the pro-

visions of the treaty existing between the United States of America and the Republic of Switzerland and conflicts with the decisions of this Court in

Cheung Sum Shee vs. *Nagle*, 268 U. S. 336;
Nielson, Adm. vs. *Johnson*, 279 U. S. 47,

and other decisions of this Court referred to in the annexed brief.

(f) The decision of the Court below which petitioner seeks to have reviewed by this Court subjects petitioner to a tax and penalty which discriminates against it, in that other corporations, both domestic and foreign, can escape the surtax involved by distributing their surplus income while the petitioner is subjected to the surtax whether it does or does not distribute its surplus income, and it conflicts with *Greene* vs. *Louisville & Interurban Railroad Co.*, 244 U. S. 499. Constitution of the United States, Article I, Section 8.

(g) In rendering its decision herein the court below disregarded or overlooked the express provisions of the Act involved and the legal effect of the administrative Regulations, which petitioner called to its attention, with respect to both the assessment of the tax and the infliction of the statutory penalty to such an extent that its action should be reviewed by his Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this

case, to the end that this case may be reviewed and determined by this Court, according to law; that the decree of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper and in conformity with law.

And your petitioner will ever pray.

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November 8th, 1943.

BRIEF IN SUPPORT OF PETITION.

I.

The court below did not properly construe Section 351 of the Revenue Act of 1936.

In affirming the decision of the Board of Tax Appeals, the court below construed Section 351 of the Revenue Act of 1936 *literally* and not in accordance with the intent and purpose for which Congress enacted that section of the Act. In effect the Circuit Court held that the words "any corporation" include *every* corporation regardless of the country of its incorporation, the country in which it was domiciled and of which it was a citizen and regardless of the fact that it transacts no business within the United States. It also necessarily held that "not more than five individuals" mean *any* five individuals who own stock in the corporation regardless of the fact that all of such individuals were non-resident aliens who transacted no business in the United States, had no office or place of business therein and were not subject to taxation by the United States. The effect of that decision is that petitioner is liable for the surtax if it does distribute its dividends; it is liable for the surtax if it does not distribute its dividends, and it has brought about an absurd, unreasonable and unjust result. That decision applied rules of statutory construction in direct conflict with the decisions made by this Court for more than one hundred and twenty-five years.

United States vs. *Palmer,* 3 Wheat. 610;
United States vs. *Kirby,* 7 Wall. 482;
Church of the Holy Trinity vs. *United States,* 143 U. S. 457;

Lau Ow Beu vs. *United States,* 144 U. S. 47;
American Banana Company vs. *United Fruit Company,* 213 U. S. 347;
United States vs. *American Trucking Association,* 310 U. S. 534.

II.

The Commissioner of Internal Revenue has no jurisdiction to levy a surtax against the petitioner herein under the Revenue Act of 1936.

The decree of the court below, in substance and effect, authorizes and empowers the Commissioner of Internal Revenue to interfere in the internal affairs of a corporation incorporated and domiciled in Switzerland, which corporation transacts no business within the United States, has no office or place of business therein, all of whose stockholders are non-resident aliens transacting no business in the United States and having no office or place of business therein. In effect that decision gives extraterritorial jurisdiction to a statute of the United States, and the decree of the court below is in conflict with the following decisions of this Court:

The Apollon, 9 Wheat. 362;
The Antelope, 10 Wheat. 66;
Hilton vs. *Guyot,* 159 U. S. 113;
Second Russian Insurance Co. vs. *Miller,* 268 U. S. 552;
United States vs. *Bank of New York & Trust Company,* 296 U. S. 463;
United States vs. *Curtiss-Wright Corporation,* 299 U. S. 304, 318;
United States vs. *Belmont,* 301 U. S. 324.

III.

The assessment of the surtax against the petitioner contravenes the provisions of the existing treaty between the Republic of Switzerland and the United States.

Since 1855 the Treaty of Commerce and Friendship between Switzerland and the United States (United States Statutes at Large, vol. 11 p. 587, vol. 18 part 2 p. 748) has been in full force and effect and, in substance, provides that citizens of both countries can manage their affairs, buy, sell and deal in every kind of property in person or by agents; that no greater tax shall be exacted from the citizens of one of the two countries than shall be levied upon the citizens of the other.

Article I provides in part as follows:

> "The citizens of the United States and the citizens of Switzerland, * * * shall be at liberty to come, go, * * * to acquire, possess and alienate therein property, to manage their affairs, * * * to consign their products and their merchandise, and to sell them by wholesale or retail, either by themselves or by such brokers or other agents as they may think proper * * *. No pecuniary or other more burdensome condition shall be imposed upon their residence or establishment, or upon the enjoyment of the above mentioned rights, than shall be imposed upon the citizens of the country where they reside, nor any condition whatever to which the latter shall not be subject."

Article II provides in part as follows:

> "No higher impost, under whatever name, shall be exacted from the citizens of one of the two coun-

> tries, residing or established in the other, than shall be levied upon citizens of the country in which they reside, nor any contribution whatsoever to which the latter shall not be liable."

The petitioner cannot escape the assessment of the surtax imposed by Section 351 of the Act. Under the provisions of Section 119 (a)(2)(B) of the Act (Pet., p. 4) petitioner's 1936 income would not be considered or treated as income from sources within the United States and, accordingly, its stockholders would in no event be taxable thereon. Other corporations, whose stockholders would be subject to either normal or surtax or both, could escape the surtax imposed by Section 351 of the Act entirely by distributing their surplus earnings to their stockholders. It is self-evident that a statute which permits one corporation to escape a tax *in toto* and denies that escape to another discriminates against the latter.

In sustaining the surtax levied against petitioner, the decree of the court below contravenes the treaty between Switzerland and the United States and is in conflict with many decisions of this Court. This Court has repeatedly held that statutes should be so construed as to harmonize with existing treaties rather than to abrogate or violate their provisions and that the obligations of such treaties should be liberally construed.

> *Asakura* vs. *City of Seattle, et al.*, 265 U. S. 332;
> *Cheung Sum Shee* vs. *Nagle*, 268 U. S. 336;
> *Jordan* vs. *Tashiro*, 278 U. S. 123;
> *Nielson, Adm.* vs. *Johnson*, 279 U. S. 47.

IV.

The court below erred in overlooking the express provisions of the Revenue Act of 1936 and the articles of the Regulations for its enforcement although they were called to the court's attention in petitioner's brief.

In petitioner's brief and on the argument before the court below petitioner clearly pointed out and stressed the importance of the provisions of Sections 119 (a)(2)(B) and 27(h) of the Revenue Act of 1936. Those provisions clearly show that petitioner's stockholders would in no event and under no circumstances be taxable on any earnings distributed to them by petitioner, and that petitioner would, therefore, be entitled to no dividend paid credit for any dividend paid by it for 1936 whether it did or did not distribute its surplus earnings. Petitioner also pointed out to the court below that, in addition to Section 119 (a)(2)(B) of the Act, Article 143-1 of the administrative Regulations* also clearly provided petitioner's stockholders would not be subject to any tax upon dividends received from petitioner. By Section 27(h) of the Act (Pet., p. 4) petitioner would be entitled to no dividend paid credit upon the amount of any dividend paid by it for 1936 as no part of such dividend would be taxable in the hands of the petitioner's stockholders.

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* Article 143-1 of the Regulations provided for a withholding tax on income paid to nonresident alien individuals except "(1) * * * (2) * * * (3) dividends paid by a foreign corporation unless (A) such corporation is engaged in trade or business within the United States or has an office or place of business therein and (B) more than 85 percent of the gross income of such corporation for the three-year period ending with the close of its taxable year preceding the declaration * * * was derived from sources within the United States * * *."

Article 102-1 of the Regulations (Pet., p. 5) states that, even though a foreign corporation derives income from sources within the United States, if it is composed entirely of nonresident alien individuals, the tax imposed by Section 102 of the Act will not apply as such individuals would not be subject to the surtax with respect to distributions of the corporation.

Article 143-9 provides, in part as follows:

> "If the tax is paid by the recipient of the income or by the withholding agent it shall not be recollected from the other, regardless of the original liability therefor, and in such event no penalty will be asserted against either person for failure to return or pay the tax where no fraud or purpose to evade payment is involved."

No fraud or purpose to evade payment of any tax due to the United States has ever been raised in this cause by the Commissioner of Internal Revenue.

All of the foregoing sections of the Revenue Act and the Articles of the administrative Regulations were expressly called to the attention of the Circuit Court. It seems patent that the court below could not properly decide this case without considering the above mentioned provisions of the law and Regulations. In its opinion that court either disregarded or inadvertently overlooked and failed to mention any of said sections or regulations. This appears to be such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

V.

The provisions of the last sentence of Article 102-1 of the administrative Regulations of the Act apply to all foreign corporations which are composed of nonresident alien individuals who are not engaged in trade or business within the United States and who do not have an office or place of business therein.

The last sentence of Article 102-1 of the Regulations is set forth in the petition, page 5. That Regulation, in express words, provides that nonresident alien individual corporate stockholders who are not engaged in trade or business within the United States and do not have an office or place of business therein, are not subject to the surtax with respect to distributions of the corporation. The Commissioner of Internal Revenue has contended that that Regulation applies only to corporations subject to taxation under Section 102, *i.e.*, corporations improperly accumulating surplus, and that it does not apply to petitioner or petitioner's stockholders although the latter are all nonresident alien individuals who are not engaged in trade or business in the United States and who have no office or place of business therein. The legal effect of the administrative Regulations made for the enforcement of the Revenue Acts are questions for decision by the Federal Courts and not by the Commissioner of Internal Revenue.

Morrill vs. *Jones*, 106 U. S. 466;
United States vs. *George*, 228 U. S. 14.

Whether petitioner's stockholders and nonresident alien stockholders of other foreign corporations, situated as petitioner is situated, are included within the last sentence

of Article 102-1 of the Regulations is a question of importance in the administration of the revenue laws which has never been passed upon by this Court.

VI.

The Commissioner of Internal Revenue has no power or authority to waive the provisions of Section 27(h) of the Revenue Act of 1936.

By Section 27(h) of the Act (Pet., p. 4) it is provided that, if any part of a distribution is not a taxable dividend in the hands of the shareholders, no dividend paid credit shall be allowed with respect to such part. Under the express provisions of Section 119 (a)(2)(B) (Pet., p. 4) a dividend paid by petitioner to its stockholders in 1936 would, as aforesaid, not be taxable to the latter, and it follows that petitioner would be entitled to no dividend paid credit even if it distributed its entire surplus earnings in 1936. Neither would it be entitled to such dividend paid credit if it did not distribute its earnings for that year. In his brief in the court below respondent contended that petitioner was denied a dividend paid credit because it failed to file a personal holding company return within the time required. On the oral argument he asserted that, if petitioner had filed a timely return, the Commissioner would have allowed petitioner a dividend paid credit. In making both of those statements respondent has exceeded his power and authority. Section 27(h) of the Act is specific and leaves no room for argument and gives respondent no discretionary power. *United States* vs. *United Verde Copper Co.*, 196 U. S. 207; *United States* vs. *George, supra.* Respondent was of necessity forced into this position of

waiving a Statute in order to sustain a tortured and erroneous construction of Section 351 of the Act. As the opinion of the court below is silent with respect to the application of Section 27(h), the petitioner believes that the question of the power and authority of the Commissioner of Internal Revenue to waive an express statutory provision of the Revenue Acts is of sufficient importance to warrant a review of the decision by this Court.

Petitioner, therefore, believes that not only is the decision of the Circuit Court of Appeals for the Fourth Circuit in this case a matter of substantial importance involving the Revenue laws of the United States but that it is also in conflict with decisions of this Court.

For the foregoing reasons it is respectfully requested that this Court exercise its supervisory powers and that the writ be allowed.

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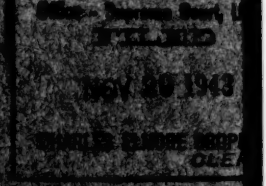


No. 478

In the Supreme Court of the United States

OCTOBER TERM, 1943

[redacted], A. C., PETITIONER

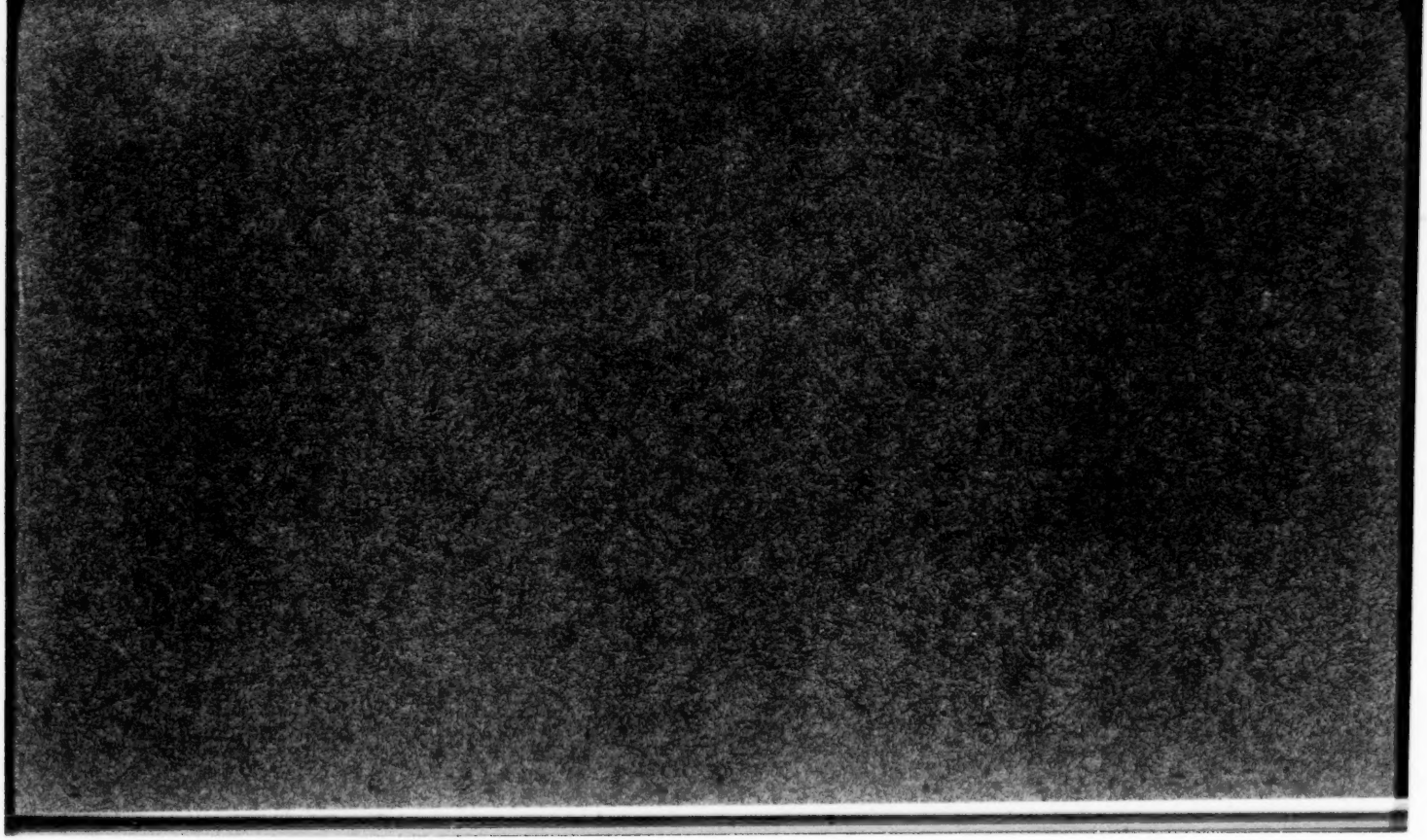
v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

[redacted]

BRIEF FOR THE [redacted]



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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 478

FIDES, A. G., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 43–50) is reported in 137 F. 2d 731 and the opinion of the United States Board of Tax Appeals (R. 26–34) is reported in 47 B. T. A. 280.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 16, 1943 (R. 51). The petition for a writ of certiorari was filed November 8, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether in the taxable year 1936 the taxpayer was a personal holding company within the meaning of Section 351 of the Revenue Act of 1936.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra*, pp. 9–14.

STATEMENT

The taxpayer is a nonresident foreign corporation. It was not engaged in trade or business in the United States during the taxable year nor did it have an office or place of business therein. During the last half of the taxable year, more than 50 percent of the value of its outstanding stock was held by not more than five individuals. All of its stockholders were nonresident aliens during that year and at all times prior thereto. (R. 28.) During the taxable year, the gross income of the taxpayer from sources within the United States was $66,504.53. All of its income consisted of interest and dividends. (R. 28–29.)

On January 3, 1940, the taxpayer filed a personal holding company return for 1936 with the Collector of Internal Revenue at Baltimore, Maryland, under protest (R. 30).

The Commissioner ruled that the taxpayer was a personal holding company under Section 351 of the Revenue Act of 1936 and determined a deficiency in personal holding company surtax of

$9,427.71 (R. 14, 17).[1] The Board of Tax Appeals upheld the Commissioner (R. 30–34), recomputing the surtax deficiency in the amount of $9,004.26 due to corrections not in question (R. 35). The Circuit Court of Appeals affirmed (R. 43–50).

ARGUMENT

The Circuit Court of Appeals held that the taxpayer is a personal holding company within the specific statutory definition and that a literal application of the statute does not lead to "absurd results or arbitrary discrimination" (R. 48). We submit that there is no conflict and that the decision is correct.

---

[1] In computing the personal holding company surtax, the Commissioner refused (R. 17, 30) to allow the taxpayer a credit, under Sections 351 (b) (2) (C) and 27 (a) of the 1936 Act (Appendix, *infra*, pp. 9, 11–12), on account of a dividend declared and paid by it during the taxable year in Swiss marks, equivalent to $28,041.25, and to allow certain claimed deductions (R. 29). This action was taken under Section 233 of the 1936 Act (Appendix, *infra*, p. 9), on the ground that the return of January 3, 1940, did not include information necessary for calculation of the credit and asserted deductions (R. 16, 30). The Commissioner further determined that the taxpayer was subject to a 25 per cent penalty under Section 291 of the 1936 Act, of $2,356.93 (R. 14, 17).

The Board of Tax Appeals sustained the Commissioner as to the denial of the credit and deductions (R. 33–34), and this was not questioned in the Circuit Court of Appeals (R. 45). As to the imposition of the penalty, the Board sustained the Commissioner (R. 33), and the court below affirmed (R. 50). The petition does not seek review of these issues.

As the taxpayer states (Pet. 2), this is the first case decided upon similar facts by the Board of Tax Appeals, and also the first to be reviewed by any circuit court of appeals. It follows that there is no conflict on the question decided. The claimed conflict (Br. 13–14) is based upon the refusal of the court below to hold that, in order to carry out the alleged Congressional intent, the statutory language should be given a meaning other than its literal meaning. But the court below took into account the line of cases in which this Court has deemed a departure from the literal meaning of a statute to be warranted, and, appraising the considerations advanced on their merits, held that here there was no sufficient reason for refusing to apply the statute as written (R. 47–48). Thus, the claim of conflict dissolves into nothing more substantial than an argument that the instant case was erroneously decided by the Circuit Court of Appeals.

The case was correctly decided below. The year involved is 1936 and the controlling statutory provision is Section 351 of the Revenue Act of 1936 (Appendix, *infra*, pp. 10–12). In 1937 Congress amended the personal holding company statute so as to exclude "foreign" personal holding companies as defined in the 1937 Act; it provided, however, that the exclusion should not apply to earlier years. (See Section 352 (b) as added to the Revenue Act of 1936 by Section 1 of the Revenue Act of 1937, c. 815, 50 Stat. 813.)

This would seem to be virtually decisive against the taxpayer for the year 1936.

The primary basis for the contention that Congress did not intend to apply the tax to foreign personal holding companies is that it would be unreasonable and absurd to apply the tax to foreign companies because (1) the sole purpose of the tax was to require the distribution of dividends to stockholders who would then become liable for the tax, and (2) the stockholders of foreign companies are not subject to tax upon dividends received and a foreign corporation could therefore never qualify for a dividends-paid credit even if it actually distributed its earnings.

1. The court below adequately disposed of the contention that the tax had no other purpose than to require distribution to stockholders who would thereby become taxable. Cf. *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107. As the court below pointed out (R. 47, 48–49), Congress provided for a tax to be automatically imposed upon corporations which come within specific objective standards without any necessity of proving a purpose to avoid the surtax on stockholders. No general exemption of foreign corporations was necessarily contemplated, since it cannot be assumed that all of the individual stockholders of a foreign personal holding company will themselves be aliens.

2. Where, as here, all the stockholders are aliens, it does not follow that a foreign corpora-

tion would for that reason be denied credit for dividends paid, under Section 27 of the Revenue Act of 1936 (Appendix, *infra,* p. 9). Section 27 (h) provides that no credit shall be allowed where distributions are not taxable "in the hands of such of the shareholders as are subject to taxation." The purpose was that the credit be not denied where distributions are made to stockholders who are not subject to the income tax. See H. Rep. No. 2475, 74th Cong., 2d Sess., p. 11 (1939–1 Cum. Bull. (Part 2) 667, 674). Thus it was intended that the credit should depend upon the character of the property distributed rather than the taxable status of the stockholders. The distribution here consisted of cash and if, as taxpayer contends, its shareholders are not subject to taxation, then Section 27 (h) does not deny the credit. The credit was denied here solely on the ground that the taxpayer had forfeited its right thereto under Section 233 by failing to return the required information. (See note (1), *supra,* p. 3.)

The taxpayer makes three further contentions which likewise present nothing substantial for review and are without merit.

The first of these (Br. 14) is that the imposition of the tax interferes with the internal affairs of the taxpayer and gives the statute extraterritorial effect. Of course, if this is so, the same is also true of the income tax imposed by Title I. No one would question the power of Congress to im-

pose an income tax on the taxpayer corporation in respect of its income derived from sources within the United States. The tax here is merely a surtax imposed in addition to the income tax imposed by Title I.

The second contention (Br. 15) is that the surtax was imposed upon the taxpayer in violation of the provisions of the 1855 Treaty between the United States and Switzerland, which requires equal treatment by each country of the citizens of the other. The contention is obviously grounded upon the taxpayer's mistaken interpretation of Section 27 (h), under which it would allegedly be denied the dividends-paid credit allowed by subdivision (a) of the section.

The third contention (Br. 19–20) is that the regulations which the Commissioner promulgated under Section 102 of the Act apply as well under Section 351. But the tax under Section 351 is a separate and distinct tax from that imposed by Section 102. The two taxes are imposed under different titles, and they were deliberately separated in order to create a class where the tax should not depend upon the purpose of the profit accumulations.[2] Accordingly, it is entirely logi-

[2] See Preliminary Report of the Subcommittee of the House Ways and Means Committee entitled Prevention of Tax Avoidance, 73d Cong., 2d Sess., submitted December 4, 1932, p. 7; also H. Rep. No. 704, same Congress and session, pp. 11–12 (1939–1 Cum. Bull. (Part 2) 554, 562–563), and S. Rep. No. 558, same Congress and session, pp. 13–14 (1939–1 Cum. Bull. (Part 2) 586, 596–598).

cal that the regulations promulgated for the administration of the two taxes should reflect this difference.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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Special Assistants to the Attorney General.

NOVEMBER, 1943.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

TITLE I—INCOME TAX

* * * * *

SEC. 27. CORPORATION CREDIT FOR DIVIDENDS PAID.

(a) *Dividends Paid Credit in General.*—For the purposes of this title, the dividends paid credit shall be the amount of dividends paid during the taxable year.

* * * * *

(h) *Nontaxable Distribution.*—If any part of a distribution (including stock dividends and stock rights) is not a taxable dividend in the hands of such of the shareholders as are subject to taxation under this title for the period in which the distribution is made, no dividends paid credit shall be allowed with respect to such part

* * * * *

SEC. 233. ALLOWANCE OF DEDUCTIONS AND CREDITS.

A foreign corporation shall receive the benefit of the deductions and credits allowed to it in this title only by filing or causing to be filed with the collector a true and accurate return of its total income received from all sources in the United States, in the manner prescribed in this title; including therein all the information which the Commissioner may deem necessary for the calculation of such deductions and credits.

* * * * *

SEC. 235. RETURNS.

(a) *Time of Filing.*—In the case of a foreign corporation not having any office

or place of business in the United States the return, in lieu of the time prescribed in section 53 (a) (1), shall be made on or before the fifteenth day of the sixth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year then on or before the fifteenth day of June. If any foreign corporation has no office or place of business in the United States but has an agent in the United States, the return shall be made by the agent.

* * * * *

TITLE IA—ADDITIONAL INCOME TAXES

SEC. 351. SURTAX ON PERSONAL HOLDING COMPANIES.

(a) *Imposition of Tax.*—There shall be levied, collected, and paid, for each taxable year (in addition to the taxes imposed by Title I), upon the undistributed adjusted net income of every personal holding company a surtax equal to the sum of the following:

* * * * *

(b) *Definitions.*—As used in this title—

(1) The term "personal holding company" means any corporation (other than a corporation exempt from taxation under section 101, and other than a bank, as defined in section 104, and other than a life-insurance company or surety company) if—(A) at least 80 per centum of its gross income for the taxable year is derived from royalties, dividends, interest, annuities, and (except in the case of regular dealers in stock or securities) gains from the sale of stock or securities, and (B) at any time during the last half of the taxable year more than 50 percentum in value of its

outstanding stock is owned, directly or indirectly, by or for not more than five individuals. * * *

(2) The term "undistributed adjusted net income" means the adjusted net income minus the sum of:

(A) 20 per centum of the excess of the adjusted net income over the amount of dividends received from personal holding companies which are allowable as a credit for the purpose of the tax imposed by section 13 or 204;

(B) Amounts used or set aside to retire indebtedness incurred prior to January 1, 1934, if such amounts are reasonable with reference to the size and terms of such indebtedness; and

(C) The amount of the dividends paid credit provided in section 27, computed without the benefit of subsection (b) thereof (relating to the dividend carry-over).

(3) The term "adjusted net income" means the net income minus the sum of:

(A) Federal income, war-profits, and excess-profits taxes paid or accrued during the taxable year to the extent not allowed as a deduction by section 23, but not including the tax imposed by this section or a corresponding section of a prior income-tax law;

(B) Contributions or gifts, not otherwise allowed as a deduction, to or for the use of donees described in section 23 (o) for the purposes therein specified, including, in the case of a corporation organized prior to January 1, 1936, to take over the assets and liabilities of the estate of a decedent, amounts paid in liquidation of any liability of the corporation based on the liability of the decedent to make any such contribu-

tion or gift, to the extent such liability of the decedent existed prior to January 1, 1934; and

(C) Losses from sales or exchanges of capital assets which are disallowed as a deduction by section 117 (d).

(4) The terms used in this section shall have the same meaning as when used in Title I.

(c) *Administrative Provisions.*—All provisions of law (including penalties) applicable in respect of the taxes imposed by Title I of this Act, shall insofar as not inconsistent with this section, be applicable in respect of the tax imposed by this section, except that the provisions of section 131 of that title shall not be applicable.

(d) *Payment of Surtax on Pro Rata Shares.*—The tax imposed by this section shall not apply if (1) all the shareholders of the corporation include (at the time of filing their returns) in their gross income their entire pro rata shares, whether distributed or not, of the adjusted net income of the corporation for such year, and (2) 90 per centum or more of such adjusted net income is so included in the gross income of shareholders other than corporations. Any amount so included in the gross income of a shareholder shall be treated as a dividend received. Any subsequent distribution made by the corporation out of earnings or profits for such taxable year shall, if distributed to any shareholder who has so included in his gross income his pro rata share, be exempt from tax in the amount of the share so included.

(e) *Improper Accumulation of Surplus.*—For surtax on corporations which accumulate surplus to avoid surtax on stockholders, see section 102.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

> ART. 351–1. *Surtax on personal holding companies.*—Section 351 of Title IA imposes (in addition to the taxes imposed by Title I) a graduated income tax or surtax upon corporations classified as personal holding companies. Corporations so classified are exempt from the surtax on corporations improperly accumulating surplus imposed by section 102 of Title I, but are not exempt from the other taxes imposed by that title. Unlike the surtax imposed by section 102, the surtax imposed by section 351 applies to all personal holding companies defined as such in article 351–2 regardless of whether or not they were formed or availed of to accumulate earnings or profits for the purpose of avoiding surtax upon shareholders.
>
> A foreign corporation, whether resident or nonresident, which is classified as a personal holding company under section 351 (b) (1) and article 351–2, is subject to the tax imposed by section 351 with respect to its income from sources within the United States. (See section 119.)
>
> ART. 351–2 [as amended by T. D. 4759 1937–2 Cum. Bull. 117, 118]. *Classification of a personal holding company.*—A personal holding company is defined as any corporation (including foreign as well as domestic corporations not otherwise exempt), first, 80 percent or more of whose gross income for the taxable year was derived from royalties, dividends, interest, annuities, and gains from the sale of stock or securities; and, second, more than 50 percent in value of whose outstanding stock

was owned, directly or indirectly, at any time during the last half of the taxable year by or for not more than five individuals. The only corporations specifically exempt from this tax are as follows: (1) Corporations exempt from taxation under section 101 of Title I; (2) banks and trust companies, as defined in section 104; (3) life insurance companies; and (4) surety companies.

It is the nature of the gross income and the ownership of the outstanding stock which determine the classification as a personal holding company, and the several conditions with respect to both must be satisfied to bring a corporation within the classification. Gross income must be determined for the entire taxable year and the ownership of the stock outstanding must be determined according to its ownership at any time during the last half of the taxable year. Inasmuch as such circumstances can vary from year to year, a corporation may constitute a personal holding company for some years and not for other years. In that case, the surtax liability shall be determined under section 351 only for the years in which the corporation comes within the classification as a personal holding company.

The gross income for purposes of section 351 (b) (1) means (1) in the case of a domestic corporation its gross income as defined in sections 22, 204, and 207 of Title I and (2) in the case of a foreign corporation, whether resident or nonresident, its gross income from sources within the United States as defined in section 119 and the regulations thereunder. * * *

U. S. GOVERNMENT PRINTING OFFICE 1943

No. 478.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

FIDES, A. G.

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

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PETITIONER'S REPLY BRIEF.

Respondent asserts (Br. 4-5), as a reason for the correctness of the decision below, the fact that, in 1937, the Revenue Act of 1936 was amended so as to exclude "foreign" personal holding companies as defined in the amendment. The question here involved concerns only the 1936 Act. However, since the respondent's assumption that the 1937 amendment "would seem to be virtually decisive against the taxpayer for the year 1936" is erroneous, petitioner deems it necessary to point out that the 1937 amendment did not exempt or exclude the petitioner or any similar corporation from the personal holding company surtax. It excluded only certain foreign corporations,

defined in the amendment, having stockholders constituting a "United States Group".

Petitioner did not, in 1936, 1937 or in any other year, have a United States Group as defined in the amendment. If petitioner was subject to the surtax in 1936, then it was equally subject to the surtax in 1937, regardless of the amendment set forth in Section 352(b). The amendment provides:

> "Section 352(b). Exceptions.—The term 'personal holding company' does not include * * * a foreign personal holding company as defined in Section 331."

Section 331 defines a foreign personal holding company as

> "(a) Any foreign corporation if (1) * * * (2) Stock Ownership Requirement.—At any time during the taxable year more than 50 per centum in value of its outstanding stock is owned, directly or indirectly, by or for not more than five individuals who are citizens or residents of the United States, hereinafter called 'United States Group' ".

An examination of these sections clearly shows that, in 1937, only those foreign corporations having resident or citizen stockholders owning 50 per cent or more of the company's stock were excluded. The petitioner is not such a corporation.

Thus, a proper judicial construction of Section 351 of the 1936 Act is important to petitioner and all corporations similarly situated for the year 1936 and subsequent years.

Respondent states (Br. 5) that, in enacting Section 351, Congress did not intend a general exemption of foreign corporations, since it cannot be assumed that all of the

individual stockholders of a foreign personal holding company will themselves be aliens. Petitioner agrees. The presumption is that all of the individual stockholders of a foreign personal holding company subject to the surtax will *not* be aliens, and petitioner asserts that Congress did not intend, by the use of the words "every corporation" and "five individuals", to embrace all corporations and all individuals everywhere found but only those corporations and individuals properly subject to the taxing jurisdiction of the United States.

Respondent states in a footnote on page 3 of his brief that a dividend paid credit was disallowed petitioner pursuant to Section 233 of the 1936 Act and that petitioner did not question the denial of the credit in the Circuit Court of Appeals. This statement in respondent's brief is misleading. In the court below petitioner questioned the respondent's reason for denial of the credit and pointed out that, under a proper construction of Section 27(h), the respondent had no discretion to allow petitioner a dividend paid credit. Petitioner does not agree with respondent's interpretation of Section 27(h) (Br. 6). As pointed out in petitioner's brief (pp. 17-18), respondent, like the court below, wholly overlooked the provisions of Section 119(a)(2)(B) whereunder the dividend paid by petitioner in 1936 is deemed to have been income to its stockholders from sources without the United States. Assuming that respondent's interpretation of Section 27(h) is proper, even if petitioner's stockholders in that year had been citizens or residents of the United States, the dividend was not of a *kind* that would have been taxable to them. Consequently, the Commissioner had no power to waive the provisions of Section 27(h) by allowing the petitioner a dividend paid credit. Similarly, the

provisions of Article 143-1 of the Regulations show that the dividend was not taxable to petitioner's stockholders.

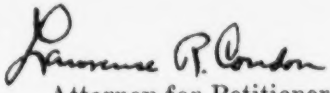
Respondent disposes of petitioner's claim that the imposition of the tax in this case gives extraterritorial effect to the statute by stating (Br. 6) that the same claim could be made with respect to the income tax imposed by Title I. There are certain fundamental differences between the imposition of the surtax in question upon petitioner and the levying of withholding tax on its income from sources within the United States under Title I. The imposition of the latter requires no interference with the corporation's affairs abroad nor does it require the corporation or any of its stockholders to do any acts or take any affirmative steps in order to comply with the law. The obligation to withhold the tax on petitioner's income received here and to make returns thereof is upon withholding agents who are subject to the taxing jurisdiction of the United States. Petitioner, through such agents, has paid withholding taxes in full (R., p. 21). On the other hand, the levy of the surtax provided by Section 351 upon corporations like petitioner (if respondent's interpretation of Section 27(h) is followed) would require foreign corporations to declare dividends periodically at their domicile in foreign countries and, in addition, would require their nonresident alien stockholders to file tax returns with the United States Treasury Department even though such stockholders could in no event be subject to taxation by the United States.

Petitioner submits that requiring these acts under the circumstances here involved is interference with the internal affairs of a foreign corporation and its foreign stock-

holders which was never contemplated by Congress when the statute in question was enacted.

The petition for certiorari should be granted.

Respectfully submitted,



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PETITION FOR RE-HEARING.

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PETITION FOR RE-HEARING.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Fides, A. G., respectfully shows to this Court the following:

1. That your petitioner heretofore applied to this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment or decree of that Court entered August 16, 1943, sustaining a deficiency surtax and penalty aggregating $11,255.33 assessed by the above named respondent against petitioner for 1936, on the ground that petitioner was a personal holding company subject to the provisions of Section 351 of the Revenue Act of 1936.

2. On information and belief that petitioner's said application was denied by this Court on or about December 13, 1943.

3. Petitioner now respectfully applies to this Court for a re-hearing of its said application for a writ of certiorari to review the aforesaid decree of said Circuit Court of Appeals and alleges that the grounds therefor are the following:

(a) That, in denying petitioner's said application, this Court apparently overlooked the language of Section 119(a)(2)(B) of the Revenue Act of 1936, which provides that any dividends paid by petitioner for that year were not considered or treated as income from sources within the United States; that petitioner's stockholders would, therefore, not be liable to pay either income or surtaxes on any dividends received by them from petitioner; and also the wording of Section 27(h) of the Revenue Act of 1936, which provides that, if petitioner's stockholders were not liable for payment of taxes thereon, petitioner would not be allowed a credit for the distribution of its earnings.

(b) That this Court apparently overlooked the fact that the result of the decree sought to be reviewed is absurd, unreasonable and unjust in that petitioner is held liable for the surtax provided by Section 351 of the Revenue Act of 1936 if it did not distribute its earnings and it is still held liable for the surtax if it did distribute its earnings, while other personal holding companies, whose stockholders were liable for income or surtax or both, could escape the surtax entirely by distributing their earnings to their stockholders.

(c) That this Court apparently overlooked the fact that the assessment of a surtax against petitioner, a citizen of and domiciled in Switzerland, which transacts no business and has no office or place of business within the United States, all of whose stockholders are nonresident aliens who transact no business and who have no office or place of business

within the United States, in substance and in effect discriminates against petitioner and contravenes the provisions of the existing treaty between the Republic of Switzerland and the United States of America. (Treaty of Commerce and Friendship, Nov. 9, 1855, United States Statutes at Large, Vol. 11, p. 587; Vol. 18, part 2, p. 748.)

(d) That, in denying petitioner's application for a writ of certiorari, this Court apparently overlooked the fact that the decree of the Circuit Court of Appeals, which petitioner seeks to have reviewed is in direct conflict with many decisions of this Court rendered from 1818 to the present time, in that it construed the words "every corporation" set forth in the statute to mean every corporation wherever situated rather than only those corporations properly subject to the taxing jurisdiction of the United States.

WHEREFORE petitioner respectfully prays that this Court grant petitioner a re-hearing of its application for a writ of certiorari to review the aforesaid decree of the United States Circuit Court of Appeals for the Fourth Circuit.

And your petitioner will ever pray.

FIDES, A. G.

By LAWRENCE R. CONDON,
Counsel.

LAWRENCE R. CONDON, counsel for FIDES, A. G., the petitioner named in the foregoing petition, respectfully certifies to this Honorable Court that he is familiar with all the proceedings heretofore had herein and that petitioner's application for a re-hearing of its petition for a writ of certiorari to review the decree of the United States Circuit Court of Appeals for the Fourth Circuit is presented to this Court in good faith and is not presented for delay.

Dated, January 6, 1943.

LAWRENCE R. CONDON,
Counsel for Petitioner.